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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

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Reexamination of the Comparative )

Standards of Noncommercial )

Educational Applicants )

MM Docket No. 95-31

To: The Commission

**COMMENTS OF  
NONCOMMERCIAL EDUCATIONAL BROADCAST LICENSEES  
ON USE OF SPECTRUM NOT  
RESERVED FOR NONCOMMERCIAL USE**

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**COMMENTS OF  
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Arizona Board of Regents for Benefit of the University of Arizona ("Arizona), Arkansas Educational Television Commission ("AETC"), Board of Regents of the University of Wisconsin System ("UWS"), Boise State University ("BSU"), Central Michigan University ("CMU"), Greater Washington Educational Telecommunications Authority ("GWETA"), Iowa Public Broadcasting Board ("IPPB"), Iowa State University of Science and Technology ("ISU"), Kent State University ("KSU"), Nashville Public Radio ("Nashville), The Ohio State University ("OSU"), Ohio University ("OU"), Board of Regents of the University of New Mexico ("UNM"), Spring Hill College ("WHIL"), South Carolina Educational Television Commission ("SCETV"), St. Louis Regional Educational and Public Television Commission ("KETC"), State of Wisconsin - Educational Communications Board ("WECB"), University of Minnesota ("U of M"), Virginia Tech Foundation ("VTF") WAMC, Washington State University ("WSU"), WSKG Public Telecommunications Council ("WSKG") (collectively, the "NCE Broadcasters"),

by their counsel, submit these joint comments in response to the Commission's *Further Notice of Proposed Rulemaking* in MM Docket No. 95-31 ("*NPRM*"), which, among other things, sought additional comment on the process used to award spectrum not specifically reserved for NCE use but for which NCE entities may apply.<sup>1/</sup>

The NCE Broadcasters agree with and support the thrust of the comments of National Public Radio, America's Public Television Stations and the Corporation for Public Broadcasting in this proceeding, but comment separately based on their individual reasons for applying for frequencies not specifically set aside for NCE use and their experiences with using unreserved frequencies. The NCE Broadcasters feel obliged to comment directly in this proceeding because of their vital interest in its impact on their pending applications for such frequencies.

#### Introduction and Summary

The NCE Broadcasters are public and private universities and university systems, non-profit community licensees, statewide public broadcast networks or governmental educational telecommunications entities. The NCE Broadcasters are experienced licensees of public broadcasting stations providing noncommercial educational broadcast services. Some of these services are transmitted over channels or frequencies not reserved specifically for noncommercial educational use. The NCE Broadcasters currently use (or have future plans to use) AM channels, non-reserved band FM channels, non-reserved band FM translator channels, TV Translator channels, and non-reserved TV channels to fulfill the Congressional mandate in

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<sup>1/</sup> The NCE Broadcasters believe that the Commission wrongly refers to such frequencies as "commercial" frequencies. Such frequencies have never been set aside for "commercial" use -- they are unreserved frequencies that must be used to serve the public interest, convenience and necessity. Some are used by commercial broadcasters; others are not.

Section 396(a) of the Communications Act for the provision of noncommercial educational broadcasting services to the public.

The NCE Broadcasters include some of the nation's oldest educational broadcasters, who pioneered AM educational radio, FM educational radio, and educational TV and who have provided such services to the public for over 75 years in the case of radio and 45 years in the case of TV. The NCE Broadcasters have participated repeatedly in comments and reply comment in the earlier stages of this proceeding, in response to rulemaking notices in GC Docket No. 92-52 in 1991 and MM Docket No. 95-31 in 1995, as well as in response to the rulemaking notice in the *Competitive Bidding* proceeding on use of auctions for unreserved channels. The NCE Broadcasters believe that their experience and their long commitment to NCE broadcasting and to a sound resolution of this particular proceeding give these joint comments weight.

Statutory Construction: The Commission Must Reject Auctions

In Section 309(j)(2)(C), of the Communications Act of 1934, as amended, the Balanced Budget Act exempted certain types of applications from the competitive bidding process, including "stations described in Section 397(6) of this Act." Section 397(6) refers to "noncommercial educational broadcast stations" and "public broadcast stations" and defines those stations as TV or radio stations which, under the FCC's rules, are eligible to be licensed by the Commission for those services and are owned and operated by a public agency or nonprofit private foundation, corporation, or association.

The statutory prohibition against competitive bidding for noncommercial educational or public broadcasters is defined not by the frequencies or channels proposed to be used by those broadcasters, but by the eligibility of the applicant and its proposed use of the frequencies or

channels. Had Congress sought to limit the exemption to applications for channels "reserved" for noncommercial educational use, it could have done so. It did not. The statutory language is clear and unambiguous.

Thus, the statute does not mean that only one subcategory of noncommercial educational broadcast stations should be exempt from competitive bidding --those stations that would use a channel or frequency specifically reserved for noncommercial educational use. This would contradict the express language of the noncommercial educational exemption in Section 309(j)(2)(C) and undermines the congressional declarations of support for "public telecommunications services" in Section 396(a) of the Communications Act. Moreover, the proposal is contrary to public policy, as there are valid public interest reasons why some "unreserved" spectrum should be made available for noncommercial educational use. Indeed, some broadcast spectrum at issue here -- AM and LPTV/TV Translator -- has no noncommercial reservation at all, although it has been used by noncommercial educational broadcasters for decades.

#### Competitive Bidding Should Not be Applied to Pending Non-Reserved Band Applications

Even if the FCC determines that the Balanced Budget Act requires it to use competitive bidding procedures to decide mutually exclusive cases for non-reserved band applications proposing noncommercial educational broadcast stations filed after July 1, 1997, the Act is clear that the FCC has discretion not to apply these procedures to pre-July 1, 1997 applications. New Section 309(l) of the Communications Act provides that the FCC shall "have the authority" to conduct competitive bidding to select among pre-July 1, 1997 competing applications "for initial licenses or construction permits for commercial radio or television stations...." This language

differs markedly from the provisions of Section 309(j), which clearly requires competitive bidding for post-Balanced Budget Act applications. The Commission should exercise its discretion not to apply competitive bidding to any competing application proposing a noncommercial educational broadcast station filed prior to July 1, 1997.

The Commission must implement Congress's explicit language and obvious intent by exempting from competitive bidding any applications for stations described under Section 397(6) of the Communications Act, regardless of whether the frequency or channel is reserved or there are also "commercial" applicants for the spectrum. The Commission may not apply auctions -- or any form of modified auction procedures -- to NCE applicants without violating the statute. Therefore, bidding credits or other specialized auction procedures are unnecessary.

Even if NCE applicants could be subjected to auction, bidding credits or other special procedures designed to "level the playing field" and enhance fair competition will not have that effect. NCE applications are structured so differently from commercial broadcasters (in terms of ultimate mission, ownership structure, financial resources, liquidity of capital, valuation of assets, and ability to obtain commercial financing) that it is not even possible to ascertain what kind of bidding credits or modified procedures might be fair. No NCE broadcaster would be able to effectively compete with a commercial broadcaster who can anticipate a long-term future "return" on the investment from advertising cash flow over the life of the station. Commercial and noncommercial broadcast applicants simply play on different fields -- how can one level the "field" between an entity whose purpose is to maximize stockholder investment and a governmental entity, university or non-profit corporation whose mission is to provide noncommercial educational broadcast service to the public?

Auctioning Frequencies Proposed for Noncommercial Educational Use  
Would Be Contrary to the Public Interest

Given the substantial federal investment in public broadcasting through the Corporation of Public Broadcasting ("CPB") and the Public Telecommunications Facilities Program of NTIA, Department of Commerce ("PTFP"), as well as the substantial state and public monies that support public broadcasting on statewide, regional and local levels, it would be contrary to public policy to force state governmental entities and non-profit corporations, such as the NCE Broadcasters, to engage in competitive bidding for non-reserved band channels that would be used on a noncommercial educational basis.

Moreover, it does not make logical sense, because at least two classes of service encompassed by the competitive bidding proposal -- AM radio stations and TV translator stations -- have no channels "reserved" specifically for noncommercial educational use. Another class of service -- FM translator -- has some channels set aside for noncommercial educational use, but the majority of non-reserved FM translator channels are used by noncommercial broadcasters due to the eligibility restrictions on commercial FM translators imposed in Section 74.1232 of the FCC rules.<sup>2/</sup>

Ineligibility

The NCE Broadcasters oppose the "ineligibility" option. The Commission's proposal to resolve the controversy of "how to decide" among NCE and commercial applicants by rendering NCE applicants ineligible for non-reserved channels is contrary to long-established precedent. It

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<sup>2/</sup> These eligibility restrictions prevent commercial broadcasters from using translators for any purpose but "fill-in" service.



is not only unfair, it is tantamount to a wholesale "reallocation" of non-reserved channels for solely commercial use and would upset decades of FCC policy governing the use of non-reserved channels. As the Commission so aptly stated in 1966 when it was allotting additional UHF TV channels:

It must be borne in mind that while educational channels ("starred" in the table) are reserved for education, non-reserved channels, usually called "commercial," are not reserved for commercial use but are equally available for use by ETV stations. The reserved status of the "starred" channels protects them from commercial applicants even though the demand for additional channels may be great. The unreserved channels are not protected and may be sought by either educational or commercial interests. There are at least half a dozen ETV stations operating on unreserved channels, and several others have gone into operation on such channels and later secured their reservation when it became clear that the channel would be used entirely for noncommercial educational broadcasting.

*Fostering Expanded Use of UHF Television Channels*, 2 FCC 2d 527 (1966).

As explained above, several of the NCE Broadcasters operate on non-reserved channels for a variety of reasons -- Channel 6 TV interference; foreign allotments; historic use of AM channels by radio pioneers, such as universities; historic use of VHF TV channels for wide geographic coverage to fulfill statewide plans; donations of AM or FM stations by commercial broadcasters to colleges, universities and non-profit organizations; purchase of AM or FM stations from commercial broadcasters; and applying (either unopposed or pursuant to settlement agreement) for vacant allotments. Thus, there are a whole range of circumstances in which NCE stations have come to use non-reserved channels. The NCE Broadcasters firmly oppose any embargo on NCE use of spectrum that is not "commercial," but simply non-reserved.

Several of the NCE Broadcasters, such as Arizona, BSU, WAMC and WSU, use non-reserved band FM translator stations to extend public radio service to unserved areas.

Existing commercial broadcasters are only permitted to use translators on a "fill-in" basis. Thus, it is no surprise that noncommercial broadcasters, in general, use far more of the FM translator spectrum and would be adversely affected if that spectrum was rendered unavailable for their use, especially where there is no reserved channel that can be used.

Instead of looking for an easy out by simply disqualifying one legitimate group of potential applicants, the Commission must make the difficult decision of how best to resolve the statutory dilemma. As set forth below, the NCE Broadcasters suggest that the dilemma should be resolved by a Section 307(b)-like determination whether there is a greater "public need" for NCE or commercial use of the channel.

#### Reserving Additional Spectrum for NCE Use

The Commission proposed reserving for channels noncommercial use on a case-by-case basis on a showing of strong public need, as well as where there are technical reasons that limit use of Channels 200-220 in the FM band -- foreign allocations and nearby operations on VHF TV Channel 6.

The NCE Broadcasters believe that this option presents a workable solution going forward, as it would permit NCE proponents at the allotment stage, to propose that a channel be reserved for NCE use based on a showing that the channel would be put to better use for NCE service, as described below. Unfortunately, it does not resolve the problem at hand -- how to decide among the current competing applications for non-reserved frequencies.<sup>3/</sup> Some of these frequencies may represent the last available frequency in a geographic area, therefore,

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<sup>3/</sup> Footnote 38 of the *NPRM* indicates that there are only 7 TV proceedings and 35 radio proceedings requiring resolution in this manner.

future ability to "reserve" another frequency for NCE use would be unavailing. Moreover, at least two services -- AM and LPTV/TV Translator, have no allotment procedures for "reserving" a frequency and another service -- FM Translator -- has widespread use of non-reserved spectrum by NCE entities (far more than use by commercial entities). In addition, there are some allocated but unapplied-for frequencies whose future use has yet to be decided. Thus, some alternate arrangements must be made.

Current MXed Applications: The NCE Broadcasters believe that an approach based on "need" should be used for all pending applications and to award applications for all currently vacant FM and TV allotments. Under this approach where there are mutually exclusive commercial and NCE applications, the Commission should first determine whether the channel is better used for NCE or commercial use, based on the following criteria:

(1) Would an NCE applicant provide a first or second NCE service to an area (based on population served)? If so, the NCE need for the channel is greater.

(2) For radio only, would an NCE applicant provide an additional NCE service in an area (based on population served) where the ratio of NCE radio service to commercial radio service is less than 1/5? (This ratio is the equivalent of the current 10% reservation of FM radio spectrum for NCE use -- 20 channels out of 100). If so, the NCE need for the channel is greater.

(3) For TV only, would the NCE applicant provide an additional NCE service in an area (based on population served) where the ratio of NCE TV service to commercial TV service is less than 1/3? (This ratio is based on the ratio of educational TV stations to non-reserved TV stations as reflected in the FCC's Broadcast Station Totals as of December 31,

1998, released by the Commission on January 25, 1999.)<sup>4/</sup> It is also based on, but less than, the 50% reservation of UHF TV spectrum used when the Commission allotted UHF TV Channels in 1966).<sup>5/</sup>

(4) For radio only, would the NCE applicant provide NCE coverage to an area that is not adequately served by NCE stations for technical reasons (i.e., VHF TV Channel 6 interference, foreign allotments, terrain obstructions, antenna siting problems, etc.)?

(5) For TV only, would the NCE applicant provide NCE coverage to an important (top 100 markets) metropolitan area that is not adequately served by NCE stations due to technical reasons (i.e., DTV cliff effect or other interference from other DTV stations during transition, terrain obstructions, antenna siting problems, etc.)?

These calculations can be based on traditional areas and populations analysis used for Section 307(b) purposes. The Commission has ample precedent on Section 307(b) analysis from allotment decisions and comparative hearings that it can apply to such "need" determinations. Thus, Commission staff would not be unduly disrupted by the study of detailed submissions.

If the NCE need for a channel is greater, NCE applicants only should be compared using the NCE point system set forth below. The winning NCE applicant would then be awarded a channel "reserved" for noncommercial educational use. This reservation would

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<sup>4/</sup> A copy of the Commission's Broadcast Station Totals as of December 31, 1998 is attached as Exhibit 1.

<sup>5/</sup> See *Fostering Expanded Use of UHF Television Channels*, 2 FCC 2d 527 (1966)("of the 1098 UHF assignment made in the coterminous 48 States . . . nearly half -- 508-- are reserved for educational use.")

avoid the "windfall" problem described in Paragraph 42 of the NPRM (when a winning NCE applicant later sells the channel to a commercial entity that would have otherwise been subject to an auction) and preclude abuse of the process by commercial applicants seeking to avoid auction payments to the U.S. Treasury by "fronting" for NCE applicants.

If the NCE need for a channel is not greater, the applicants would proceed to auction under the existing, applicable rules for broadcasters.

The NCE Broadcasters believe that this approach will accommodate the legitimate public need for additional noncommercial use of non-reserved frequencies in certain circumstances without unduly burdening the broadcast auction process. Moreover, this approach would have no effect on the conversion to digital television, as the seven pending proceedings involving both NCE and commercial applicants for vacant NTSC allotments must comply with the Commission's recent *Second Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders in MM Dkt. No. 87-268*, released December 18, 1998, which will ensure protection of existing NTSC stations and DTV allotments from any new entrants.

Settlement Window and Opportunity for Petitions to Deny. The NCE Broadcasters also believe that, after adoption of the rules in this proceeding, the Commission should open another settlement window for competing NCE and commercial broadcast applications for non-reserved channels as well as opportunities to file petitions to deny against unqualified applicants. The NCE Broadcasters believe that, once some certainty is established about how the recipient of the frequency is selected, a number of pending MXed application proceedings will be settled expeditiously, which will eliminate the necessity to devote staff resources to the "need" determination.

Going Forward -- Future Reservations. The NCE Broadcasters believe that the Commission can help accommodate the future legitimate needs of NCE broadcasters to use non-reserved spectrum by allowing applicants more easily to propose noncommercial reservation at the allotment stage for FM and TV channels. NCE Broadcasters initially interested in using an FM or TV frequency noncommercially could request reservation at the allotment stage. If the reservation request were unopposed, the channel could be allotted with a noncommercial reservation.<sup>6/</sup> If the reservation request were opposed, the relative need for noncommercial or commercial use of the new channel would be determined based on the "need" demonstration set forth above.<sup>7/</sup> While the ability to reserve a channel at the allocation stage should not preclude NCE Broadcasters from later filing for an allotted frequency during the application stage (as set forth above), the ability to reserve a frequency at the allotment stage should significantly decrease the number of times the Commission would be required to make the "need" determination in conjunction with its mutually exclusive application.

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<sup>6/</sup> The NCE Broadcasters can discern no legitimate policy reason why the Commission should continue to refuse to reserve a non-reserved channel for noncommercial use at the allotment stage if the reservation of the channel is unopposed. In the past, the Commission has stated that the preclusion of Channels 200-220 due to the need to protect existing noncommercial educational station licenses or permits is not a sufficient reason to reserve a non-reserved channel for noncommercial use and refused to make the reservation unless the reserved band (Ch. 200-220) was precluded by TV Channel 6 interference or foreign allotments. In such situations, the Commission has reasoned that a noncommercial applicant could compete at comparative hearing with a commercial applicant for the allotted channel. As explained above, the use of competitive bidding for non-reserved broadcast spectrum drastically changes this reasoning.

<sup>7/</sup> The NCE Broadcasters believe that use of the AM spectrum is fully mature, thus, the spectrum will not accommodate many (if any) new station applications. Thus, the NCE Broadcasters do not believe that Footnote 36 of the NPRM present a realistic problem.

This approach also will not have a detrimental effect on DTV transition, as any newly allotted channels must be DTV and must protect existing NTSC stations and DTV allotments. However, this approach would help ensure that any NCE proponents for new DTV allotments have a fair opportunity to allot channels (and compete against commercial broadcasters based on NCE "need") for new DTV stations, or to apply for new DTV stations that can supply NCE television coverage to areas with "gaps" that occur due to inadequate replication of NTSC signals, DTV cliff effect, unanticipated off-air reception problems from DTV, and changes in cable carriage requirements, as well as a fair opportunity to apply for new DTV stations after the return of NTSC channels. Thus, the system that the Commission devises in this proceeding must also accommodate the future legitimate need for new NCE DTV stations on channels that may become available after DTV transition is complete.

Settlement Window and Opportunity for Petitions to Deny. The NCE Broadcasters also believe that, after adoption of the rules in this proceeding, the Commission should open another settlement window for competing NCE and commercial broadcast applications for non-reserved channels as well as opportunities to file petitions to deny against unqualified applicants. The NCE Broadcasters believe that, once some certainty is established about how the recipient of the frequency is selected, a number of pending Mxed application proceedings will be settled expeditiously, which will eliminate the necessity to devote staff resources to the "need" determination.

FM Translators. The NCE Broadcasters believe that the current FM translator processing criteria in Section 73.1233 should be used to resolve competing applications for NCE versus commercial FM translators if an additional criterion favoring displacement

applications over non-displacement applications is included. These criteria are clear, well-known and easily applied. Applicants applied for FM translators in reliance on these existing rules, therefore, application of the current FM translator processing rules will be fair and equitable for all parties.

TV Translators. The NCE Broadcasters believe that the current FM Translator processing criteria in Section 73.1233 can also be applied successfully to mutually exclusive TV Translator and LPTV applications with the additional displacement criterion set forth above.

Special Processing Track and Hybrid Approach. The NCE Broadcasters believe that, while laudable from a noncommercial broadcasting standpoint, the special NCE processing track previously proposed by NPR, APTS and CPB does not present a workable solution, as it invites abuse from speculators. The NCE Broadcasters believe that public broadcasters, including those commenting here and those represented by APTS and NPR, would not be likely to abuse the privilege, but that other noncommercial entities -- some of which have on file presently literally tens (if not hundreds) of applications for new stations, might file such applications, even if only to avoid the increasingly fierce competition between NCE applicants for the scarcer reserved spectrum. Thus, the NCE Broadcasters believe their proposed "middle ground" based on NCE "need" would better fulfill the Commission's mandate to serve the public interest by ensuring NCE access to non-reserved spectrum, while avoiding unnecessary burdens on broadcast auction proceedings.

In addition, and for the reasons set forth in separate comments filed today by the NCE Broadcasters on the "NCE vs. NCE" portion of this rulemaking, the NCE Broadcasters



believe that a hybrid approach that uses a lottery or a point system is unworkable. The lottery approach is plagued by constitutional infirmities from the minority preference. Both the lottery/auction and the point system/auction hybrids suffer from insurmountable obstacles based on the inherent differences in how "diversity" and "control" manifest themselves in the commercial versus noncommercial context. As explained above in the bidding credit discussion, there is simply no fair way of comparing NCE and commercial applicants that are competing for an non-reserved channel unless the need for the NCE channel is first considered and resolved.

### CONCLUSION

For the reasons stated above, the Commission is precluded from subjecting applicants proposing noncommercial educational service to competitive bidding. Instead, the Commission should use a modified system, based on a determination of greater need for NCE or commercial service, to determine how the channel should be used and, thus, awarded. The Commission should also permit reservation of channels for noncommercial educational use at the allotment stage, in order to accommodate the legitimate need for NCE use of non-reserved channels. It is not sound public policy to apply competitive bidding, lotteries or a point system to applicants proposing to use a channel for a noncommercial educational broadcast station regardless of whether the channel is reserved or non-reserved.

Respectfully submitted,

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January 28, 1999

## **EXHIBIT 1**



# NEWS

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F 2d 385 (D.C. Cir 1974).

January 25, 1999

## BROADCAST STATION TOTALS AS DECEMBER 31, 1998

The Commission has announced the following totals for broadcast stations licensed as of December 31, 1998:

AM RADIO	4793
FM RADIO	5662
FM EDUCATIONAL	2017
<hr/> TOTAL	<hr/> 12472
UHF COMMERCIAL TV	660
VHF COMMERCIAL TV	561
UHF EDUCATIONAL TV	243
VHF EDUCATIONAL TV	125
<hr/> TOTAL	<hr/> 1589
FM TRANSLATORS & BOOSTERS	3175
UHF TRANSLATORS	2743
VHF TRANSLATORS	2176
<hr/> TOTAL	<hr/> 8094
UHF LOW POWER TV	1568
VHF LOW POWER TV	560
<hr/> TOTAL	<hr/> 2128

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